

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DESMOND W. THOMPSON,)
Petitioner,)
vs.) CV NO. 10-718 JC/CG
UNITED STATES OF AMERICA,) CR NO. 09-489 JC
Respondent.)

ORDER

THIS MATTER comes before the Court on the United States' *Motion for Enforcement of Subpoena*, (Doc. 17), and *Petitioner's Response to United States' Motion for Enforcement of Subpoena*, (Doc. 18). The United States requests that the Court enforce the subpoena duces tecum it served on Richard Winterbottom, Mr. Thompson's trial attorney. (Doc. 17 at 1-2). The United States further requests that the Court conduct an *in camera* review of Mr. Winterbottom's file for any documentation relating to Mr. Thompson's claim that he instructed Mr. Winterbottom to file an appeal following his guilty plea. (*Id.*). Petitioner objects to Mr. Winterbottom disclosing any part of his file on the grounds of attorney-client privilege but does consent to have the Court conduct an *in camera* review of Mr. Winterbottom's file. (Doc. 18 at 1-2). For the reasons set forth in the opinion below, the Court will **GRANT IN PART AND DENY IN PART** the United States' motion.

In May of 2011, the Court determined that an evidentiary hearing was appropriate to consider whether Mr. Thompson had instructed Mr. Winterbottom to file an appeal.

Following that determination, the United States served a subpoena duces tecum on Mr. Winterbottom, requiring that he produce “any and all materials in relation to U.S. v. Desmond Thompson 09-CR-489 JEC concerning possible appeal of his conviction.” (Doc. 17-1). The United States further requested that Mr. Winterbottom provide an affidavit detailing his representation of Mr. Thompson, that Mr. Winterbottom answer interrogatories, and that government counsel be allowed to review Mr. Winterbottom’s file. (Doc. 17-2 at 1-2). Mr. Winterbottom declined to provide an affidavit, respond to the government’s interrogatories, or produce Mr. Thompson’s file. (*Id.*). Mr. Winterbottom stated that the contents of Mr. Thompson’s file were protected by client-attorney privilege and could not be disclosed. (*Id.*). However, Mr. Winterbottom did not object to the Court conducting an *in camera* review of those documents which relate to Mr. Thompson’s claim that he sought to appeal his conviction.

Because both Mr. Thompson and Mr. Winterbottom have asserted the attorney-client privilege, the Court finds that it is premature to grant the enforcement of the United States’ subpoena at this time. As an alternative to immediate enforcement of the subpoena, all three parties have suggested that the Court conduct an *in camera* review of the relevant privileged documents. (Doc. 17 at 2; Doc. 17-2 at 1-2; Doc. 18 at 1-2). The Court finds this to be most prudent course.

IT IS THEREFORE ORDERED that the United States’ *Motion for Enforcement of Subpoena*, (Doc. 17), be **GRANTED IN PART AND DENIED IN PART**. The Court declines to enforce the subpoena duces tecum at this time, but will conduct an *in camera* review of the relevant privileged documents from Mr. Winterbottom’s file. Mr. Winterbottom shall

make available to the Court any documents from Mr. Thompson's file relating to the issue of whether an appeal was sought.



THE HONORABLE CARMEN E. GARZA
UNITED STATES MAGISTRATE JUDGE